Filed 12/27/18 P. v. Cook CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS DELANY COOK,

Defendant and Appellant.

E068458

(Super.Ct.No. FVI1500314)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

[NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. The opinion filed in this matter on December 4, 2018, is modified as follows:

1. On page 8, line 9; the word "phychologist" should be changed to read "psychologist."

2. On page 16, lines 7 and 8 originally read as follows:

Defendant's score on the Static 99R evaluation also indicated that he had a recidivism rate of 7.9 percent within five years after release from custody.

It has been changed to read as follows:

Defendant's Static 99R evaluation also indicated that he had a low to moderate risk of reoffending if released on probation.

Except for these modifications, the opinion remains unchanged. The modifications do not affect a change in the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.

Filed 12/4/18 P. v. Cook CA4/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS DELANY COOK, Defendant and Appellant.	E068458 (Super.Ct.No. FVI1500314) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Frank J. Torrano, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Thomas Delaney Cook had sexual relations with one of his dance students when he was 21 years old and the victim was 13 years old. Following a jury trial, defendant was convicted of two counts of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 1 & 2)[1] and two counts of oral copulation with a person under the age of 16 (§ 288a, subd. (b)(2); counts 3 & 4). The trial court denied defendant probation and sentenced him to eight years in state prison with 960 days of credit for time served. On appeal, defendant argues the trial court misunderstood the scope of its discretion when it found defendant ineligible for probation under section 1203, subdivision (e), because section 1203.066, subdivision (d), is the applicable probation eligibility statute. We find the error to be harmless and affirm the judgment.

II

FACTUAL BACKGROUND

In 2014, 13-year-old A.M. was taking dance classes at a dance studio in Hesperia. Defendant was her 21-year-old hip hop dance instructor. Defendant knew A.M. was 13 years old, and A.M. knew defendant was in his twenties. Through a social media app, defendant sent messages to A.M. telling her that she was gorgeous and pretty. After a week of exchanging flirtatious messages, A.M. told defendant that what they were doing

[1] All future statutory references are to the Penal Code unless otherwise stated.

was not okay and they should stop. Defendant responded that he could not stop and that they had to keep talking. A.M. convinced herself it was okay because her mother was 15 when she married her father who was 28 years old. Defendant and A.M. exchanged texts stating they missed each other and wanted to see each other. They did not spend any time together in public other than at the dance studio, but discussed that they could go out when she was 18 years old.

On December 26, 2014, A.M.'s grandfather dropped A.M. off at a mall. Defendant picked A.M. up from the mall and drove her to his house in Victorville, where no one was home. After they arrived at defendant's house, defendant and A.M. went to defendant's bedroom where they listened to music while on his bed. They began kissing, and defendant removed A.M.'s bottom clothing and his own clothes. Defendant then walked over to his closet and put on a condom. A.M. was scared, so she told defendant "no." She thought if she told defendant no, he would respect her decision. However, defendant "was very persistent" and told her, "I already have it on. I don't want to waste the condom." A.M. let him insert his penis into her vagina. Defendant eventually ejaculated and removed the condom. He then orally copulated A.M.'s vagina, and she orally copulated his penis. After they finished having sexual relations, defendant and A.M. talked for around 20 minutes. Defendant then drove A.M. back to the mall where she was picked up by her grandfather and driven home.

During the first week of January 2015, while A.M. was still 13 years old, defendant had sexual intercourse with her again. This time A.M.'s mother dropped her

off at the dance studio an hour before her jazz class started. Defendant was not teaching a class that day, but he was parked around the studio waiting for A.M. After A.M.'s mother left, A.M. walked to defendant's car. Defendant then drove A.M. to his house in Victorville again. Once they got to defendant's house, they had sexual intercourse on his bed. Afterward, A.M. orally copulated defendant's penis. Defendant then drove A.M. back to the dance studio, where she was late for her class.

In early February 2015, A.M.'s uncle, who lived across the street from her, confronted defendant outside A.M.'s house asking defendant why he was there. A.M.'s uncle informed A.M.'s mother of his encounter with defendant and that he had seen defendant standing outside her home. A.M.'s mother questioned A.M. about defendant and saw a call coming in from defendant on A.M.'s cellular phone. A.M.'s mother answered the call, and asked defendant why he was calling her daughter. Defendant hung up the phone. After initially refusing to disclose the encounter, A.M. eventually admitted to her mother that she had sex with defendant, and she gave her mother the password to unlock her cell phone. A.M. and her mother then went to the police station in Hesperia.

San Bernardino County Sheriff's Deputy Brian Ogas interviewed A.M. and her mother. On A.M.'s cell phone, Deputy Ogas found two photographs of A.M. with defendant. One photograph showed defendant and A.M. kissing on December 26, 2014. Defendant had taken the picture with his cell phone and sent it to A.M. The other photograph showed defendant and A.M. on defendant's bed on the same day, after they had sex, and A.M. was holding defendant's penis with her hand.

Deputy Ogas had A.M. make a pretextual call to defendant and recorded their conversation. Defendant told A.M. not to get caught talking to him, and asked A.M. if she had deleted "the text messages." Defendant also told A.M. that he could delete the text messages on her phone from a computer, without having her phone. He also stated that he missed her, cared about her, and did not want to lose her. He also asserted that he was scared of going to jail and losing everything he had because of her age. Defendant then instructed her to delete the call when they were done talking, and ended the conversation by saying, "Erase everything."

Deputy Ogas interviewed defendant the following day and recorded the interview. Initially, defendant repeatedly denied having sexual intercourse with A.M., but eventually admitted to having sexual intercourse with A.M. twice and orally copulating each other on both occasions when A.M. was 13 years old. Defendant also admitted that because of the age difference it was inappropriate and a mistake for him to take her to his house.

III

DISCUSSION

Defendant argues the trial court misunderstood the scope of its discretion when it found him ineligible for probation under section 1203, subdivision (e), because section 1203.066, subdivision (d), is the applicable probation eligibility statute in this case. He further argues that the trial court's failure to exercise lawful discretion prejudiced him and, therefore, a new sentencing hearing is required. The People respond defendant forfeited this claim for failing to raise it at the sentencing hearing. In the

alternative, the People argue that a remand is unnecessary because the trial court considered whether defendant was suitable for probation under the relevant criteria and concluded defendant was ineligible.

A. *Additional Background*

Prior to the preliminary hearing, the matter was referred to the probation officer for completion of a Static 99R evaluation and report. Defendant's Static 99R evaluation concluded that defendant "received a total score of 3, which place[d] him in the Low to Moderate Risk Category for being convicted of another sexual offense, if he [was] released on probation."

Following the guilty verdicts and prior to the sentencing hearing, defendant was again referred to the probation department for a presentence probation report. The probation officer interviewed defendant on April 4, 2017, and submitted the presentence probation report. In the presentence probation report, the probation officer noted that defendant's Static 99R evaluation placed defendant at an "average risk category for being convicted of another sexual offense, if he is released on probation" and that defendant's recidivism rate was "7.9% within five years after release from custody." The probation officer also pointed out the probation eligibility in this case, noting that statutory provisions limiting or prohibiting a grant of probation existed in this case. Specifically, the probation officer cited, "PC 1203(e) Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons PC 1203.066(a)(8), a person who, in violating

Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age. PC 1203.066(b), 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." The probation officer also noted the criteria affecting probation pursuant to California Rules of Court,[2] rule 4.414, as well as, the circumstances in aggravation and mitigation. The probation officer concluded that defendant should be sentenced to a total term of nine years four months in state prison based on defendant taking an advantage of a position of trust, defendant's knowledge of the victim's age from the beginning, defendant's understanding of the potential consequences, and the serious nature of the offenses.

On April 21, 2017, defendant was again referred to the probation department to consider and address a packet submitted by defense counsel. The submitted packet contained a section 288.1 report and victim impact statements. The probation officer reviewed the submitted packet, and noted that both defendant's psychological evaluation and the section 288.1 report found defendant to be "an appropriate candidate for a grant of probation." The probation officer further stated that both psychologists asserted defendant was "willing to participate in therapy as ordered by the Court or directed by the Probation Department." The probation officer also explained, "However, they [the psychologists] also mention the defendant rationalizes his behavior and that is something that would need to be addressed. It appears as if the defendant told both Psychologists

[2] All future rule references are to the California Rules of Court.

that he was willing to participate in therapy since it would be ordered and not because he needs it. The defendant still fails to take any responsibility for his actions." The probation officer concluded that in considering the circumstances of the offense, the victim impact statements from A.M. and her mother, the presentence probation report, the section 288.1 report, the packet submitted by defense counsel, defendant's failure to take responsibility for his actions, and the average risk score on the Static 99R, defendant was not an appropriate candidate for probation "as well as being statutorily ineligible due to the circumstances of the offense and the convicted charges."

Dr. Joy Smith Clark, the clinical and forensic phycologist who evaluated defendant, concluded that defendant had demonstrated remorse and that he was a good candidate for therapy and treatment. Dr. Smith Clark explained: "He [defendant] is verbal and intelligent. He also presents as being motivated for change. He has gained insight into his functioning. He has a good support network with family and friends. He does not present as a danger to the victim and/or to her family." In attachments to her psychological report, Dr. Smith Clark also noted the criteria set forth in section 1203.066: (1) no force or coercion appeared to be involved in the commission of the offenses; (2) no bodily injury occurred; (3) defendant was not a stranger to the victim and "he thought she was 18"; (4) no weapon was used in the commission of the crimes; (5) defendant had no prior convictions for any crimes; (6) no kidnapping occurred and "[i]t was a mutual agreement"; (7) there was only one victim; (8) the victim was older than 11 years old; (9) defendant was "in a special trust position and in a position of authority" as he was the

victim's dance instructor; and (10) the sexual acts included intercourse and oral copulation. In her attachments, Dr. Smith Clark further indicated that probation may be granted if all of the following exist: (1) defendant was not a member of the victim's family or household; (2) defendant had been incarcerated for about two years and it was assumed that the victim was aware of his incarceration; (3) defendant presented as a good candidate for treatment and education as he was motivated, verbal, and intelligent; and (4) defendant did not appear to be a threat to the victim or to her family as he had no history of "violent acting-out."

Defendant's sentencing hearing was held on May 19, 2017. At that time, the trial court indicated that it had read and considered the probation report, the subsequent memorandum from the probation officer, Dr. Smith Clark's psychological report, and the People's sentencing memorandum. Regarding Dr. Smith Clark's report, the trial court stated: "The report itself is—well, six pages. And it has attachments, and her attachments are not signed on the original. I have some attachments that were—that are separated that were filed with the Court March 28th, 2017, and they are signed but none of the lines [the individual factors] are checked. And so, frankly, the last two pages of the attachment are worthless because I don't know what she is—what it is she's trying to have the Court understand. So it is what it is."

The court thereafter heard from the victim's mother, argument from counsel, and a statement from defendant. Defense counsel argued that defendant took responsibility for his actions, he was remorseful, and was willing to do counseling. Defense counsel

believed the court had been unintentionally misled, noting the victim came to court looking innocent as possible, contrary to the photographs of the victim submitted by the defense, and the victim was not emotionally harmed as she was doing great in school with a 4.0 average. Defense counsel also stated that the supplemental probation memorandum was filled with inaccuracies and speculation, and requested the court consider either probation or the mitigated term in this case. The prosecutor argued that defendant should be sentenced to state prison as recommended by the probation officer, noting defendant had lied to Dr. Smith Clark when he informed the doctor that he found out the victim was 13 one month after the first incident and claimed that the second incident did not occur. The prosecutor also noted that defendant informed Dr. Smith Clark that once he found out the victim was 13, he ended the relationship, told her to not contact him in any way, and that the victim was upset with him for ending it.

Following argument, the trial court denied defendant probation, stating there were statutory provisions limiting or prohibiting a grant of probation. The court acknowledged that Dr. Smith Clark's report and the section 288.1 report were "positive." The court cited section 1203, subdivision (e), as did the probation officer's report, as limiting probation to unusual cases where the interest of justice would be served by defendant receiving probation. The court stated as follows: "The criteria affecting probation, Rule 4.414 specifically (a)(9), the defendant took advantage of a position of trust or confidence to commit the crime. [¶] The Court looks at the circumstances in aggravation, Rule 4.421. The probation officer chose to use the taking advantage of a

position of trust, and that is a dual use. I will not use that to aggravate him, and there are no other aggravating factors. [¶] The circumstances in mitigation, Rule 4.423(b)(1), the defendant has no prior record." The court thereafter noted that it was using its discretion to not impose the upper term, and sentenced defendant to the middle term of six years on count 1, plus a consecutive middle term of two years on count 2, and concurrent middle terms of two years on counts 3 and 4.

B. *Forfeiture*

The People argue defendant forfeited his claim that the trial court found him ineligible for probation based on an inapplicable sentencing provision, namely section 1203, subdivision (e). Defendant responds that he did not forfeit his claim on appeal because his contention presents a pure question of law and he did not have a meaningful opportunity to object. In the alternative, defendant asserts that even if this court finds he forfeited the issue, this court has the discretion to address his claim and/or relief must still be granted based upon ineffective assistance of counsel. Defendant further argues that the denial of a fair hearing is itself prejudicial and requires a remand.

We reject the People's reliance on *People v. Scott* (1994) 9 Cal.4th 331 to support their assertion that defendant forfeited his claim by failing to raise it in the trial court. *Scott* merely states that "complaints about the manner in which the trial court *exercises its sentencing discretion* and articulates its supporting reasons cannot be raised for the first time on appeal." (*Id*. at p. 356, italics added; see *People v. DeSoto* (1997) 54 Cal.App.4th 1, 4.) Defendant does not complain about the manner in which the court

actually exercised its discretion, but rather claims the court did not exercise that discretion. Relief is warranted on direct appeal, however, only when the court's misunderstanding of its discretion is affirmatively reflected in the record. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 945.)

Here, the record affirmatively shows, as defendant notes, the court did not exercise its discretion under section 1203.066 in denying him probation. The probation officer in the presentence probation report indicated defendant's probation eligibility pursuant to section 1203, subdivision (e), noting "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons PC 1203.066(a)(8), a person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age." Although the probation officer and Dr. Smith Clark noted section 1203.066, the trial court relied on section 1203, subdivision (e), and rule 4.414 in finding defendant ineligible for probation. Further, the trial court did not understand Dr. Smith Clark's attachments which noted the criteria affecting probation eligibility in this case pursuant to section 1203.066, subdivision (d).

The record here affirmatively shows that the trial court believed defendant was statutorily ineligible for probation under section 1203, subdivision (e), except in unusual cases where the interest of justice would best be served, and misunderstood the scope of its sentencing discretion. We nevertheless conclude that the error was harmless.

C. *Harmless Error*

Although remand for proper exercise of a trial court's discretion often is the appropriate remedy when that court misunderstood the existence or scope of its discretion (see, e.g., *People v. Rodriguez* (1998) 17 Cal.4th 253, 257, superseded by statute on another ground as noted in *People v. James* (2001) 91 Cal.App.4th 1147, 1149; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 660-661 (*Sherrick*)), in the circumstances of this case defendant cannot carry his burden to show the factors set forth in section 1203.066, subdivision (d), could be satisfied, and therefore it would be an abuse of discretion for the trial court on remand to grant him probation. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1248 (*Bruce G.*) ["a remand for resentencing would be an idle act if it would be an abuse of discretion to grant probation in this case"]; cf. *People v. Deguzman* (1996) 49 Cal.App.4th 1049, 1055 (*Deguzman*) ["Whether the trial court believed it had discretion to strike the alleged prior felony convictions or not, appellant has suffered no prejudice since it would have been a manifest abuse of that discretion to exercise it on this record."].)

Section 1203.066, subdivision (a), provides a presumption against a grant of probation in certain circumstances, including when, as in this case, "[a] person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age." (§ 1203.066, subd. (a)(8).) Subdivision (b) of section 1203.066 provides: " 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral

copulation, or masturbation of either the victim or the offender." However, that general presumption may be overcome and probation granted if the trial court makes all five findings under section 1203.066, subdivision (d).

Subdivision (d)(1) of section 1203.066 provides: "If a person is convicted of a violation of Section 288 or 288.5, and the factors listed in subdivision (a) are *not pled or proven*, probation may be granted only if the following terms and conditions are met:[3]

"(A) If the defendant is a member of the victim's household, the court finds that probation is in the best interest of the child victim.

"(B) The court finds that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.

"(C) If the defendant is a member of the victim's household, probation shall not be granted unless the defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by his or her return. . . .

"(D) If the defendant is not a member of the victim's household, the court shall prohibit the defendant from being placed or residing within one-half mile of the child victim's residence for the duration of the probation term unless the court, on the record,

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[3] In this case, there is no dispute that the factors listed in subdivision (a) of section 1203.066 were not pled or proven. Accordingly, by law, section 1203.066, subdivision (d), applied in this case.

states its reasons for finding that this residency restriction would not serve the best interests of the victim.

"(E) The court finds that there is no threat of physical harm to the victim if probation is granted."[4] (Italics added.)

The general presumption against a grant of probation in these types of cases may be overcome and probation granted if the trial court makes all five findings under section 1203.066, subdivision (d)(1). Here, based on the trial court's comments at the sentencing hearing and lack of any evidence showing rehabilitation of defendant was feasible and that defendant was truly amenable to undergoing treatment as identified in section 1203.066, subdivision (d)(1)(B), defendant cannot show the court would have imposed probation had it known its discretionary choice. Indeed, the trial court did not even believe a low term was warranted in this case. The court stated that probation was denied and that "defendant took advantage of a position of trust or confidence to commit the crime[s]." The court further noted that interest of justice would not be served by defendant receiving probation.

Moreover, contrary to defendant's assertion, there is no evidence on this record to show that defendant was entitled to a grant of probation under section 1203.066, subdivision (d)(1). (See *People v. Lammey* (1989) 216 Cal.App.3d 92, 98 (*Lammey*) ["Here, appellant presented no evidence regarding whether the child's best interest

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[4] Defendant correctly notes that because defendant was not a "member of the victim's household," subparagraphs (A) and (C) of section 1203.066, subdivision (d)(1) are irrelevant.

required that he not be imprisoned. . . . Thus appellant failed to carry his burden of persuading the court to grant probation."].) Specifically, there is no evidence in the record to demonstrate that the trial court would have found rehabilitation of the defendant was feasible and that the defendant was amenable to undergoing treatment. Defendant scored a three out of 10 on the Static 99R evaluation, which placed him at the average risk category for being convicted of another sexual offense, if he was released on probation. Defendant's score on the Static 99R evaluation also indicated that he had a recidivism rate of 7.9 percent within five years after release from custody.

Furthermore, although Dr. Smith Clark noted that defendant was amenable to treatment based on his education, motivation and intelligence, her report also indicates that defendant lied and minimized his culpability in committing the offenses during her examination of defendant. Defendant informed Dr. Smith Clark that he believed the victim was 18 years old when he first met her and that he did not know the victim was 13 years old until one month after the first incident. Defendant also reported to Dr. Smith Clark that once he found out the victim was 13 years old, he ended the relationship and told her not to contact him in any way. Defendant further stated, "She was upset with me ending it. She went on Twitter and said 'I f-ing hate you.' so I contacted her and tried to explain to her why I had to cut it off and to say that I was sorry that it had to be because of her age and that I could get into a lot of trouble. She finally said that she understood." The above statements by defendant are contrary to the evidence received at trial. Defendant also asserted to Dr. Smith Clark during her evaluation of defendant that "I

only wish her mom could see how her daughter misleads people." Dr. Smith Clark's report does not indicate whether she had examined the trial testimony before concluding defendant was amenable to treatment. Moreover, she does not explain in detail why rehabilitation of defendant was feasible considering he minimized and rationalized his actions, besides pointing out that he presented as a good candidate due to his motivation, verbal skills, and intelligence. Under these circumstances, the trial court reasonably could have elected to deny defendant probation despite Dr. Smith Clark's findings. Furthermore, as noted by the probation officer, the record indicates that defendant was willing to participate in therapy because he would be ordered to do so by the court or directed by the probation department, not because he needed it. Defendant told Dr. Smith Clark that he was "willing to do anything the court wants me to do. I'll go in therapy and take classes, anything."

Because there was no evidence under the circumstances of this case on which the trial court could have found rehabilitation of the defendant was feasible and that the defendant was amenable to undergoing treatment, the trial court did not prejudicially err by denying him probation. Therefore, any misunderstanding the trial court had regarding the scope of its discretion under section 1203.066, subdivision (d)(1), was harmless, and remand for resentencing is unwarranted because a grant of probation based on the record would be an abuse of discretion. (See *Bruce G.*, *supra*, 97 Cal.App.4th at p. 1248; *Deguzman, supra,* 49 Cal.App.4th at p. 1055; cf. *Lammey, supra*, 216 Cal.App.3d at p. 98 [applying harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836];

People v. Gutierrez (1987) 195 Cal.App.3d 881, 884-885 [Resentencing not required despite trial court's error regarding interpretation of section 1203.066, subdivision (c)(1), because, applying *Watson*, it was not reasonably probable the court would have found defendant eligible for probation had the error not occurred.].)

Defendant asserts that " '[w]here, as here, a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination.' " Nonetheless, as already discussed, the trial court could not have granted probation based on this record. A defendant has the burden to present evidence showing that he is entitled to consideration for probation under subdivision (d) of section 1203.066. (See *People v. Groomes* (1993) 14 Cal.App.4th 84, 89; accord, *Lammey*, *supra*, 216 Cal.App.3d at p. 98.) Testimony indicated that defendant was not a member of the victim's household, satisfying subparagraphs (A) and (C) of section 1203.066, subdivision (d)(1). However, the record does not present evidence as to the other requirements. Because defendant did not satisfy this burden of proof under section 1203.066, subdivision (d)(1), the trial court's sentence was not in error. (See *Lammey*, at p. 98 [the judgment should be affirmed on appeal due to the defendant's failure to present any evidence regarding his eligibility for probation under section 1203.066].)

Defendant relies on *Sherrick*, *supra*, 19 Cal.App.4th 657 and *People v. Manners* (1986) 180 Cal.App.3d 826 (*Manners*) to support his position that remand for a new sentencing hearing is required in this case. In *Sherrick*, the appellate court ordered

resentencing where the trial court erroneously believed the defendant who had pled guilty to a substantive offense had also admitted probation ineligibility under section 1203.066, subdivision (a)(8). (*Sherrick*, at p. 660.) In *Manners*, resentencing was ordered because, although section 1203.066 probation ineligibility presumption applied, the record failed to demonstrate the trial court knew it could still grant probation under subdivision (c). (*Manners*, at p. 835.) This case is distinguishable from *Sherrick* and *Manners*. Here, unlike in *Sherrick*, the trial court did not erroneously believe defendant had admitted to probation ineligibility under section 1203.066, subdivision (a)(8). In addition, contrary to the trial court in *Manners*, here the record clearly shows that the court was aware it could grant defendant probation under section 1203.066. Dr. Smith Clark's report clearly indicated the criteria affecting defendant's probation eligibility under section 1203.066.

Furthermore, for the reasons explained above, we will affirm the judgment because it is not reasonably probable that the trial court would have imposed a more favorable sentence in the absence of the error. (*People v. Avalos* (1984) 37 Cal.3d 216, 233 [unless it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error, no need to remand when trial court errs in making a sentencing choice]; *People v. Gutierrez* (1991) 227 Cal.App.3d 1634, 1638 [the question is whether it is reasonably probable that the trial court will impose a more favorable sentence if the matter is remanded].)

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.